BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RANDOLPH L. CALDWELL	)	
Claimant	)	
VS.	)	
	)	Docket No. 1,053,286
DIVERSIFIED CONCEPTS, LLC	)	
Respondent	)	
AND	)	
	)	
TRAVELERS INSURANCE COMPANY	)	
Insurance Carrier	)	

ORDER

Claimant requests review of the March 13, 2012 Award[1] of Special Administrative Law Judge (SALJ) Jerry Shelor. The Board heard oral argument on June 20, 2012.

APPEARANCES

James E. Martin, of Overland Park, Kansas, appeared for the claimant. Brent Johnston, of Kansas City, Kansas, appeared for respondent and its insurance carrier (respondent).

RECORD AND STIPULATIONS

The Board has considered the record and adopted the stipulations listed in the Award.

ISSUES

The SALJ denied compensation based on his finding that claimant did not suffer personal injury by accident arising out of and in the course of his employment with respondent.

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[1] An error with the docket number in the caption of the Award was corrected by a Nunc Pro Tunc Order dated March 14, 2012.

Claimant argues the Board should reverse the SALJ's decision and find that he did suffer personal injury by accident arising out of and in the course of his employment and award him permanent partial disability benefits (PPD) based on a 12.5 percent permanent functional impairment to the whole person.

Respondent maintains the Award should be affirmed, because when claimant was injured he was working as the owner of his own private business, not in his capacity as an employee of respondent. A number of issues raised by the parties were not addressed in the Award because the SALJ found them to be moot.

Issues on Appeal

1. Whether claimant suffered personal injury by accident arising out of and in the course of his employment with respondent;

2. Whether the relationship of employer and employee existed between claimant and respondent on the date of the accident;

3. Average weekly wage;

4. Whether claimant should be awarded temporary total disability compensation (TTD) from August 3, 2010 to September 15, 2010, a period of 6.29 weeks;

5. Whether respondent should be ordered to pay $64,115. 43 in medical bills as detailed in claimant's exhibit 1 to the September 13, 2011 regular hearing transcript;

6. Whether claimant is entitled to future medical treatment; and

7. The nature and extent of claimant's disability.

FINDINGS OF FACT

Claimant was age 53 on August 3, 2010, the date of the alleged injury. He was an employee of respondent and his job was to manage a storage facility/office park in Kansas City, Missouri, which was owned by respondent. Claimant testified his job duties included running the office, accepting payments, leasing storage lockers, mowing, cleaning up around the property, and painting.[2] As part of his employment with respondent, claimant was provided with an apartment on the property he managed.

[2] R.H. Trans. at 7.

In addition to his employment as a property manager for respondent, claimant owned and operated a cleaning business, Pickle Jar. In his capacity as owner of Pickle Jar, claimant contracted with companies to clean their offices. Claimant testified that Pickle Jar "morphed" from office cleaning to mowing and snow removal.[3]

Claimant testified that at about 1:00 p.m. on the date of the accident, he began mowing an area of respondent's property referred to as "the jungle." According to claimant, Pickle Jar and respondent had agreed that Pickle Jar would mow certain specific areas of respondent's property. The areas Pickle Jar contracted to mow were commonly referred to as "the jungle" and "the fields." Another company had contracted to mow and trim other areas of the office park.

Claimant usually performed his mowing as owner of Pickle Jar after his regular working hours or on Sundays.[4] However, there were times when claimant was directed by Anthony Santaularia, a part owner and regional manager of respondent, to mow during claimant's regular working hours. When claimant was directed by respondent to mow during claimant's regular hours, he received only his regular salary. Claimant was paid separately for the "after hours" mowing he did per the contract between Pickle Jar and respondent. Claimant testified that under Pickle Jar's contract with respondent, Pickle Jar was required to mow, per summer, "the jungle" six times and "the fields" eight times.[5] Claimant submitted invoices for the work he did pursuant to the respondent/Pickle Jar agreement and Pickle Jar was paid separately from claimant's salary as respondent's employee.

Claimant testified that the mowing he did as part of his work for respondent was done once a month. Claimant testified that Anthony Santaularia would tell him when he needed to mow on company time.[6] Claimant used his own mower when he mowed during his regular hours for respondent. He used the same mower when he mowed for Pickle Jar. Claimant testified that the agreement he entered into with respondent, through Mr. Santaularia, was made in the presence of respondent's office manager, Alisha Lutes.[7]

On August 3, 2010, claimant was approached by Mr. Santalauria, who told claimant it was probably time to mow "the jungle" again. In the process of mowing "the jungle", the

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[3] R.H. Trans. at 8.

[4] Claimant's regular working hours as an employee of respondent were 9:30 a.m. to 5:30 p.m. Monday through Friday, and 9:30 a.m. to 2:00 p.m. on Saturday.

[5] R.H. Trans. at 11.

[6] R.H. Trans. at 12.

[7] R.H. Trans. at 14.

mower tipped over on a sloped area and rolled two or three times. The mower landed on top of claimant. He felt immediate pain in his ribs and shoulder blades and he experienced difficulty breathing.[8] Claimant managed to get his cell phone out of his pocket and called his office manager, Andy Cardin. Mr. Cardin went to where claimant was, got the mower off of him and took him to St. Joseph Hospital. Claimant received treatment during his 10 1/2 day stay in the hospital and continued under medical care for a period of time following his release.

Claimant testified that the job description offered into evidence as exhibit 4 at the deposition of his supervisor, Anthony Santaularia, did not accurately represent all of his duties and responsibilities for respondent because there was a lot more to his job than is contained in that job description.

Andrew "Andy" Cardin, office manager for respondent, testified that claimant was his supervisor and the two of them worked together to mow areas on the property. Mr. Cardin confirmed that claimant called him on August 3, 2010, after the mower he was using tipped over onto him. Mr. Cardin picked claimant up and took him to the hospital.

Mr. Cardin testified that he had witnessed claimant mowing "the jungle" both on company time and during nonbusiness hours.[9] He also testified that Mr. Santaularia was aware of claimant mowing during normal business hours. Mr. Cardin believed that the mowing was a part of claimant's job for respondent and that Mr. Santaularia was lying when he testified that it was not.

Mr. Cardin testified that the job description provided by Mr. Santaularia for claimant's job as property manager did not encompass all that claimant did as part of that position. The description did not specify what hours claimant was to work, nor did it include work done by claimant off the clock. Mr. Cardin testified that at times claimant assisted customers needing to conduct business after claimant's shift ended and claimant would take care of them. The written description was silent about mowing.

Mr. Cardin was uncertain as to when claimant was mowing for Pickle Jar and when he was mowing for respondent. Although Mr. Cardin was office manager, he did not know how often claimant turned in invoices for work he did for respondent via Pickle Jar.

Anthony Santaularia, former real estate and development property manager for respondent, testified he worked for respondent for eight years and left in February 2011. During his employment with respondent, Mr. Santaularia was claimant's supervisor. Mr. Santaularia confirmed respondent had a contract with Pickle Jar to provide mowing

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[8] R.H. Trans. at 15.

[9] Cardin Depo. at 8.

services at respondent's location where claimant was employed. Mr. Santaularia and claimant agreed by written correspondence and fax about what services Pickle Jar would provide and what Pickle Jar would be paid for its services.[10] The contract was finalized on November 7, 2007, and was in effect on August 3, 2010.

Mr. Santaularia testified that the contract required Pickle Jar to mow in the designated areas when not working for respondent as an employee, that is, 9:30 a.m. to 5:30 p.m., Monday through Friday, and 9:30 a.m. to 2:00 p.m. on Saturday. Mr. Santaularia testified that claimant was never asked to do additional mowing during his work hours for respondent. The written contract had no provision regarding when Pickle Jar would perform the mowing required by the instrument. Claimant provided invoices to respondent for the work Pickle Jar did on the property. Mr. Santaularia would inspect the property to make sure the work was completed to respondent's satisfaction before paying the invoices. This colloquy occurred during questioning at Mr. Santlaularia's deposition:

> A. . . . He has a contract to mow a certain set number of times per year . . .
>
> Q. Did you ever have any discussions with Mr. Caldwell that mowing at those periods of time made it impossible for the mower to get through that amount of grass or whatever he had to mow?
>
> A. I'm not sure I understand.
>
> Q. Well , sure. Mr. Caldwell has testified that if you mowed it only once a month,[11] it was too tall. You couldn't get a mower through it. So you had to mow it more often than that. So he did company mows, and then he did Pickle Jar mows.
>
> A. What do you mean, to like mow it down, or he didn't have enough time during the day or --
>
> Q. No. I mean if he only mowed it once a month, it was too tall to mow --
>
> A. Oh, okay.
>
> Q. -- he had to mow it more often. So in order to do that, he mowed it in between the Pickle Jar mows, the ones that you had on the contract that are listed on --
>
> A. Gotcha. Okay. No, I -- I understand what you're saying now.
> If did he that [sic], it would be at his own convenience to help himself out, but it was never for -- at our request.

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[10] Santaularia Depo. at 7.

[11] A reference to the requirements of the contract.

Q. And it's your testimony you never were aware of that ?

A. That's correct.

Q. And you were never present when he discussed that with you?

A. That is correct.

Q. And what were the normal business hours? I -- you said --

A. I believe at this location they were Monday through Friday from 9:30 through 5:30, and Saturday from 9:30 until 2:00.[12]

Mr. Santaularia testified that company records showed the last invoice paid prior to claimant's date of accident was dated July 14, 2010, and it was received September 28, 2010. Mr. Santaularia testified he was unaware of claimant mowing on the property during regular working hours. He also testified that mowing was not part of claimant's job duties with respondent.[13] Mr. Santaularia denied having any conversations with claimant about mowing the property on company time and definitely not in front of Alicia Lutes.

Alisha Lutes testified that she works part-time for Global Warming Snow Removal. Her duties require her to handle the company's invoices. Ms. Lutes also testified that she previously worked for Diversified Concepts for four years as relief manager and thereafter as office manager. She began her employment for respondent at the end of September 2006 and stayed until April 30, 2010, when her services were no longer needed. During her employment with Diversified Concepts, Ms. Lutes' boss was claimant.

Ms. Lutes testified that the job description produced by Mr. Santaularia was not all inclusive of claimant's duties. Claimant frequently did "weed eating" and handled customer service issues in the early morning hours. According to Ms. Lutes, claimant was required to wash windows and change light bulbs, among a variety of other duties not specifically included the job description. Claimant worked after hours on respondent's property under the contract Pickle Jar had with respondent.

Ms. Lutes testified that the mowing on respondent's property was done by Pickle Jar and another contractor, Artistic Design. In addition to the mowing performed by Pickle Jar, claimant also mowed during times he was "on the clock" as an employee of respondent and being paid his regular wages. Ms. Lutes testified that the extra mowing was necessary because the areas claimant mowed were difficult to mow because of the terrain and when

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[12] Santaularia Depo. at 28-29.

[13] Santaularia Depo. at 11-12.

the weather was wet, more frequent mowing was necessary.[14] Ms. Lutes was present for conversations between claimant and Mr. Santaularia in which claimant was directed to mow during his regular hours. Ms. Lutes also observed claimant carry out those instructions during claimant's regular hours.

Ms. Lutes stated that arrangements were made between claimant and Anthony Santaularia to adjust the times in which the "fields" and "the jungle" were mowed because those areas of respondent's property needed mowing more frequently than Pickle Jar's contract required.[15] Claimant told Anthony Santaularia that he would do the extra mowing during regular work hours to keep the expenses down under the contract with respondent and Pickle Jar.[16] Mr. Santaularia agreed and Ms. Lutes witnessed the conversation.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee where the employee incurs personal injury by accident arising out of and in the course of employment.[17] Whether an accident arises out of and in the course of the worker's employment depends upon the facts associated with each case.[18]

K.S.A. 2010 Supp. 44-501(a) states in part: "In proceedings under the workers compensation act, the burden of proof shall be on the claimant to establish the claimant's right to an award of compensation and to prove the various conditions on which the claimant's right depends."

K.S.A. 2010 Supp. 44-508(g) defines burden of proof as follows: "'Burden of proof' means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record."

K.S.A. 2010 Supp. 44-508(d) provides in relevant part:

> "Accident" means an undesigned, sudden and unexpected event or events, usually of an afflictive or unfortunate nature and often, but not necessarily, accompanied by a manifestation of force. The elements of an accident, as stated herein, are not

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[14] Lutes Depo. at 14.

[15] Lutes Depo. at 28.

[16] Lutes Depo. at 29.

[17] K.S.A. 2010 Supp. 44-501(a).

[18] *Halford v. Nowak Construction Co.*, 39 Kan. App. 2d 935, 186 P.3d 206, *rev. denied* 287 Kan. 765 (2008).

> to be construed in a strict and literal sense, but in a manner designed to effectuate the purpose of the workers compensation act that the employer bear the expense of accidental injury to a worker caused by the employment.

K.S.A. 2010 Supp. 44-508(e) defines “personal injury” and “injury”:

> “Personal injury” and “injury” mean any lesion or change in the physical structure of the body, causing damage or harm thereto, so that it gives way under the stress of the worker’s usual labor. It is not essential that such lesion or change be of such character as to present external or visible signs of its existence. An injury shall not be deemed to have been directly caused by the employment where it is shown that the employee suffers disability as a result of the natural aging process or by the normal activities of day-to-day living.

The two phrases arising "out of" and "in the course of" employment, as used in the Kansas Workers Compensation Act, have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable.

> The phrase "out of" employment points to the cause or origin of the worker’s accident and requires some causal connection between the accidental injury and the employment. An injury arises out of employment when there is apparent to the rational mind, upon consideration of all the circumstances, a causal connection between the conditions under which the work is required to be performed and the resulting injury. Thus, an injury arises out of employment if it arises out of the nature, conditions, obligations, and incidents of the employment. The phrase "in the course of" employment relates to the time, place, and circumstances under which the worker’s accident occurred and means the injury happened while the worker was at work in the employer’s service.[19]

It is often difficult to determine in a given case whether a person is an employee or an independent contractor because there are, in many instances, elements pertaining to both relationships that may occur without being determinative of the actual relationship.[20]

There is no absolute rule for determining whether an individual is an independent contractor or an employee.[21] The relationship of the parties depends upon all the facts, and the label that they choose to employ is only one of those facts. The terminology used

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[19] *Kindel v. Ferco Rental, Inc.*, 258 Kan. 272, 899 P.2d 1058 (1995); *Brobst v. Brighton Place North*, 24 Kan. App. 2d 766, 955 P.2d 1315 (1997).

[20] *Jones v. City of Dodge City*, 194 Kan. 777, 402 P.2d 108 (1965).

[21] *Wallis v. Secretary of Kans. Dept. of Human Resources*, 236 Kan. 97, 689 P.2d 787 (1984).

by the parties is not binding when determining whether an individual is an employee or an independent contractor.[22]

The test primarily used by the courts in determining whether the employer-employee relationship exists is whether the employer had the right of control and supervision over the work of the alleged employee and the right to direct the manner in which the work is to be performed, as well as the result that is to be accomplished. It is not the actual interference or exercise of control by the employer, but the existence of the right or authority to interfere or control that renders one a servant, rather than an independent contractor.[23]

In addition to the right to control and the right to discharge the worker, other commonly recognized tests of the independent contractor relationship are:

(1) The existence of a contract to perform a piece of work at a fixed price.

(2) The independent nature of the worker's business or distinct calling.

(3) The employment of assistants and the right to supervise their activities.

(4) The worker's obligation to furnish tools, supplies and materials.

(5) The worker's right to control the progress of the work.

(6) The length of time the employee is employed.

(7) Whether the worker is paid by time or by job.

(8) Whether the work is part of the regular business of the employer.[24]

ANALYSIS

There is no real dispute that claimant did in fact sustain personal injury by accident on August 3, 2010. Claimant's description of the accident and his injury was corroborated by Mr. Cardin's testimony and by other evidence in the record which need not be detailed here.

Also undisputed is that claimant had an employment relationship with respondent wherein claimant performed the job of property manager. The preponderance of the evidence also proves that claimant, doing business as Pickle Jar, had another legal

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[22] *Knoble v. National Carriers, Inc.*, 212 Kan. 331, 510 P.2d 1274 (1973).

[23] *Wallis*, 236 Kan. at 102-103.

[24] *McCubbin v. Walker*, 256 Kan. 276, 886 P.2d 790 (1994).

relationship with respondent, and that was of principal and independent contractor. However, the difficulty presented by this claim is that the distinction is somewhat blurred between the work required by virtue of claimant's status as an employee of respondent and the work required by virtue of claimant's status as an independent contractor. Accordingly, the issue at the center of this review is whether claimant's personal injury by accident arose out of and in the course of claimant's employment, on the one hand, or out of and in the course of the status of claimant, doing business as Pickle Jar, as an independent contractor.

Claimant's personal injury by accident did not arise out of and in the course of the contract between Pickle Jar and respondent. The evidence is undisputed that the parties contemplated that the mowing required under the contract between Pickle Jar and respondent was to be undertaken by claimant after claimant's regular hours as respondent's employee. Claimant's accidental injury occurred about 1:00 p.m., approximately mid-way between the beginning and the ending of claimant's shift. The testimony of claimant, Mr. Cardin, and Ms. Lutes, establish that claimant's regular work duties as an employee of respondent required that he perform periodic mowing in the same areas of respondent's property covered under the contract between Pickle Jar and respondent, via Mr. Santaularia. Mr. Santalauria specifically directed claimant to mow "the fields" and "the jungle" during claimant's shift as respondent's employee. On such occasions, claimant was not paid anything under the Pickle Jar contract, but rather just received his normal salary as respondent's employee.

The testimony of Mr. Santaularia that claimant was not required to mow as part of his employment duties conflicts with the testimony of Mr. Cardin and Ms. Lutes, both of whom corroborated claimant's testimony and diminished the credibility of Mr. Santaularia's testimony. The record reveals why claimant was directed to mow the fields and the jungle while on duty as property manager: the Pickle Jar contract did not call for sufficiently frequent mowing of those areas of the property in order to keep up with the heavy growth of vegetation. Moreover, claimant told Mr. Santaularia that his efforts to keep up with the growth in the fields and the jungle would serve to save respondent money under the Pickle Jar contract, a statement, according to Ms. Lutes, which was acknowledged and agreed to by Mr. Santalauria.

The Board finds that claimant suffered personal injury by accident arising out of and in the course of his employment on August 3, 2010. The Board further finds that the Award of SALJ Jerry Shelor, dated March 13, 2012, as corrected by the Nunc Pro Tunc Order dated March 14, 2012, should be reversed and the claim remanded to the SALJ to address the other issues raised by the parties.

CONCLUSIONS

Having reviewed the entire evidentiary file contained herein, the Board finds that claimant has sustained his burden of proof that he suffered personal injury by accident

arising out of and in the course of his employment with respondent on August 3, 2010. The Board further finds that this claim should be remanded to the SALJ with directions to make findings of fact and conclusions of law regarding the other issues raised by the parties. The Board does not retain jurisdiction of this claim.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Special Administrative Law Judge Jerry Shelor dated March 13, 2012, as corrected by the Order Nunc Pro Tunc dated March14, 2012, is hereby reversed and the claim is remanded to the SALJ with directions to address the remaining issues raised by the parties.

IT IS SO ORDERED.

Dated this _____ day of August, 2012.

_____
BOARD MEMBER

_____
BOARD MEMBER

_____
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